United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 76-7262

To be argued by
MACDONALD FLINN

United States Court of Appeals

B

For the Second Circuit

HAROLD S. LEE, ERIC LEE and LESTER LEE,
Plaintiffs-Appellees,

P/S

vs.

JOSEPH E. SEAGRAM & SONS, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF DEFENDANT-APPELLANT, JOSEPH E. SEAGRAM & SONS, INC.

WHITE & CASE
Attorneys for Defendant-Appellant,
Joseph E. Seagram & Sons, Inc.
14 Wall Street
New York, New York 10005
(212) 732-1040

Of Counsel:
MACDONALD FLINN
E. MILES PRENTICE, III
ROBERT W. MANNIX

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals

For the Second Circuit

Docket No. 76-7262

HAROLD S. LEE, ERIC LEE and LESTER LEE,

Plaintiffs-Appellees,

vs.

JOSEPH E. SEAGRAM & SONS, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF DEFENDANT-APPELLANT, JOSEPH E. SEAGRAM & SONS, INC.

Issues Presented for Review

1. Whether New York's parol evidence rule bars proof of an alleged oral agreement by a distiller to relocate two of the plaintiff-owners of a distributorship where that agreement was part of the consideration for and induced the written contract for the sale of that distributorship and the written contract would not have been entered into without the oral promise.

2. Whether the alleged oral agreement was so vague and indefinite as to be unenforceable.

3. Whether there was a failure to introduce competent evidence in support of plaintiffs' damage claims.

Statement of the Case

This is an appeal by defendant Joseph E. Seagram & Sons, Inc. from a judgment entered June 30, 1975, pursuant to a jury verdict rendered in a trial before the Hon. Charles H. Tenney, United States District Judge for the Southern District of New York. Only the first claim of the amended complaint, asserting common law breach of an oral contract, was submitted to the jury, which returned a verdict in favor of plaintiffs in the amount of $407,850. Judge Tenney granted Seagram's motion for a directed verdict dismissing certain antitrust claims. His opinion, filed April 28, 1976, denying Seagram's motion for judgment notwithstanding the verdict is unreported. It is reproduced in the joint appendix. (94a)[1]

This action was commenced on January 20, 1972, by Harold S. Lee and his sons, Lester and Eric, against defendant-appellant, Joseph E. Seagram & Sons, Inc., a distiller and supplier of alcoholic beverages. The plaintiffs collectively owned 50 percent of the stock of Capitol City Liquor Company, Inc., a Washington, D.C. distributor of alcoholic beverages, including brands of Seagram and others. The balance of Capitol City's stock was owned by Harold Lee's brother, Henry, and his son Arthur. Harold Lee had been an employee of Seagram for some thirty years and was the head of its Calvert sales division in 1962, when, at the age of 63, he left Seagram, took over the management of Capitol City, and brought his sons into that business as officers and stockholders. (124a-128a)

The plaintiffs allege that Seagram, as a condition to and in return for the sale of Capitol City's assets and good will, agreed within a reasonable time to relocate or obtain for

1. References to the joint appendix are by page numbers and suffix "a." References to the exhibit volume of the joint appendix are by page number and prefix "E." References to any portion of the trial transcript not included in the joint appendix are in the form "Tr. —," and references to exhibits are in the form "PX—" or "DX—," together with the page of the exhibit volume of the joint appendix volume where the cited portion is reproduced. Unless otherwise noted, emphasis in quoted passages has been added.

Lester and Eric Lee a distributorship acceptable to them but about half the size and worth of Capitol City. The detailed, written contract by which each of the plaintiffs and Henry and Arthur Lee, both individually and with Capitol City, agreed to sell its assets and good will for $2,500,000 is dated August 18, 1970, and was amended in writing on August 25, 1970.[2] (PX 7 and 8, E33 and E38) That transaction was closed on September 30, 1970. The written contract, however, makes no reference to the alleged promise by Seagram to relocate Lester and Eric in another house.

The only evidence of the claimed oral agreement was the deposition testimony of Harold Lee, who died before the trial. He testified that in early June, 1970, he advised Seagram's executive vice preseident, Jack Yogman, that all of the Lees wanted to sell Capitol City. He testified further, however, that on that occasion (and only on that occasion) he told Yogman (and only Yogman) that, "our house is not for sale at any price unless Lester and Eric are relocated." At that meeting, Lee testified, Yogman made no commitment to buy Capitol City and did not even express any interest on the part of Seagram in buying. (135a-136a, 381a-382a)

Some time later, John Barth, another Seagram representative, having been commissioned by the Company's president, Edgar Bronfman, to find a distributorship for Carter, visited Harold Lee in Washington and told him that Seagram was interested in buying Capitol City. (219a-225a, 390a-397a) Harold Lee testified, "When he [Barth] said they were interested, it was a tacit admission [that Lester and Eric] would be relocated." (137a) Even though extensive negotiations were thereafter conducted by the Lees with Seagram officials other than Yogman, Harold Lee testified that he never spoke with any Seagram representative about relocating his sons until after the closing, and the sons confirmed that they had never heard that subject men-

2. Seagram entered into the purchase and sale agreement to obtain a distributorship for its employee, Chester Carter. The agreement was assignable by Seagram and the closing was scheduled to permit Carter to obtain the liquor license necessary to his operation of Capitol City's business. Seagram helped finance the purchase by Carter.

tioned during the negotiations with the Seagram people. (132a, 135a-137a, 140a, 141a, 143a-144a, 177a-178a, 240a-241a, 249a-250a, 381a-382a, 384a, 389a, 406a, 416a) There is neither evidence nor claim by the plaintiffs that following the solitary meeting with Yogman Harold Lee or any representative of plaintiffs ever discussed with any Seagram representative relocation of Lester and Eric as a condition to the sale of Capitol City.

Yogman unequivocally denied that Harold Lee had ever laid down any condition that his sons be relocated in another distributorship as a prerequisite to the sale of Capitol City. Yogman testified that neither he nor any other representative of Seagram could make such a promise or commitment inasmuch as no supplier can compel its independent distributors to sell their businesses. (333a-335a) Yogman testified further that he had no recollection of telling either Bronfman or Barth that Harold Lee had advised Yogman that the Lees wanted to sell Capitol City, that he had no advance knowledge of Barth's trip to Washington to ask Harold Lee whether the Lees would sell, and that he did not learn that Carter was involved until the subsequent negotiations were under way. (335a-336a, 339a-341a) Finally, Yogman testified that not until some time after the closing did Harold Lee tell Yogman that he wanted to find something for his sons to do, preferably in the liquor wholesaling field, and that Lee would like help in finding them a house, to which Yogman responded in substance, "We'll do what we can. Should we hear of anything we will let you know."[3] (341a-342a)

---

3. Yogman testified that he also told Harold Lee, "Look hard. You know the distributors a lot better than I do. You have been in the business longer than I have and you have been in the sales area. You can probably find a house for your two sons a lot better than we can . . . . Harold, maybe you can generate a sale; maybe you can visit some of your old friends in the industry and . . . ask them if they want to sell" (341a-342a). Harold Lee testified that, in fact, "I contacted a good many friends of mine around the country . . . and asked them if there was anything available . . . , and in every case, they just couldn't find anything anybody wanted to sell." (144a-145a)

ARGUMENT

POINT I

Proof of the alleged oral agreement is barred by New York's parol evidence rule.

A. Introduction

Because proof of the alleged oral agreement to relocate Lester and Eric Lee in another distributorship is barred by New York's strong parol evidence rule, Seagram maintains that it was error to deny its motions for a directed verdict and dismissal at the close of the plaintiffs' case and again after all the evidence and that it was error to deny its motion after trial for judgment notwithstanding the verdict.

In denying Seagram's motion for judgment n.o.v., the trial judge concluded that proof of the alleged oral agreement was not barred by the parol evidence rule, holding that "the written agreement contained the entire agreement of the parties with regard to the sale of the assets of Capitol City, but that the oral agreement was not so clearly connected with that transaction as to be part and parcel of it. The oral agreement was collateral and was not inconsistent with the terms of the writing." (112a)

The parol evidence rule is not a rule of evidence. *Smith v. Bear*, 237 F.2d 79, 83 (2d Cir. 1956). As the New York Court of Appeals reiterated in the leading case of *Fogelson v. Rackfay Construction Co.*, 300 N.Y. 334, 338, 90 N.E. 2d 881, 882 (1950):

> "An important principle of substantive law, . . . [the parol evidence rule] was designed to permit a party to a written contract to protect himself against 'perjury, infirmity of memory or the death of witnesses,' and, while its application may on occasion seem to work injustice, 'on the whole it works for good.' . . . The rule, defining the limits of the contract to be construed, forbids proof of an oral agreement to add to or vary the writing."

That same court has declared New York's policy of strong adherence to the parol evidence rule.[4]

Mitchill v. *Lath*, 247 N.Y. 377, 160 N.E. 646 (1928), is the classic statement of the New York rule. It holds that "at least three conditions must exist" before a prior or contemporaneous oral agreement will be admissible:

> "Under our decisions before such an oral agreement as the present is received to vary the written contract, at least three conditions must exist: (1) The agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing, or, put in another way, an inspection of the written contract, read in the light of surrounding circumstances, must not indicate that the writing appears 'to contain the engagements of the parties, and to define the object and measure the extent of such engagement.' Or, again, it must not be so clearly connected with the principal transaction as to be part and parcel of it." (247 N.Y. at 380-81, 160 N.E. at 647)

B. Plaintiffs admit that the alleged oral agreement to relocate Lester and Eric Lee was part of the consideration for and induced the written agreement by all the Lees to sell Capitol City and that there would have been no written agreement without the oral agreement.

While recognizing that determination as to whether the conditions set forth in *Mitchill* have been met is for the

4. "In applying this test, the policy of our courts is to be considered. We have believed that the purpose behind the rule was a wise one, not easily to be abandoned. Notwithstanding injustice here and there, on the whole it works for good. Old precedents and principles are not to be lightly cast aside, unless it is certain that they are an obstruction under present conditions. New York has been less open to arguments that would modify this particular rule than some jurisdictions elsewhere." *Mitchill* v. *Lath*, 247 N.Y. 377, 380, 160 N.E. 646, 647 (1928).

court and not the jury,[5] the trial judge paid only lip service to them in wholly disregarding the plaintiffs' own evidence and characterization of the alleged oral agreement to relocate Lester and Eric Lee. Contrary to the allegation in the amended complaint that the agreement to sell Capitol City embodied in the written contract was a "separate transaction" (¶16, 26a), the trial and the record make it clear that the alleged oral agreement obligating Seagram to obtain for and relocate the plaintiffs in another distributorship was part and parcel of the agreement for the sale of Capitol City.

The testimony of Harold Lee, the only witness to the claimed oral agreement, is unequivocally to the effect that on behalf of all five Lees (the plaintiffs and Henry and Arthur) he offered to sell Capitol City, but only on the condition that Seagram would relocate his sons. His testimony and that of Lester Lee establish that there would not have been any agreement to sell Capitol City without the alleged prior or contemporaneous oral agreement to relocate them.

Harold Lee testified that before he initiated his discussion with Yogman of the desire on the part of all the Lees to sell Capitol City he conferred with his sons and Henry and Arthur Lee as to their willingness to do so. After obtaining their consent to sell (conditional on the part of his sons), he arranged the meeting with Yogman. (128a-132a) He testified that at that meeting,

> "I said, 'Jack, this is getting to be an unwieldy family. I think Washington would be an ideal place for a black distributor if you feel that way, but our house is not for sale at any price unless Lester and Eric are relocated.' That was the initial statement. I said, 'I don't even want to go into a discussion with you, Jack, unless conditions are—we will sell you the house providing we can arrive at a satisfactory price but under no conditions is the house for sale unless

5. *Plum Tree, Inc.* v. *N. K. Winston Corp.*, 351 F. Supp. 80, 84 (S.D.N.Y. 1972); *Eskimo Pie Corp.* v. *Whitelawn Dairies, Inc.*, 284 F. Supp. 987, 991 (S.D.N.Y. 1968).

Eric and Lester will be relocated.' . . . I told him that our house was not for sale under any conditions unless Lester and Eric could be relocated in some other area in another house." (132a, 134a)

Lester Lee testified at the trial without reservation that, in addition to the approximately $2,500,000 which Seagram paid for Capitol City, another obligation assumed by Seagram was to relocate him and his brother in another Seagram distributorship. (177a) He testified that he would not have agreed to the sale of Capitol City unless Seagram agreed to obtain a new distributorship for them and that this was Eric's position as well. (177a-178a)

In addition, in a District of Columbia action transferred to the court below and involving the parties here as well as Henry and Arthur Lee, Harold Lee stated in an affidavit, "As a condition of this proposed sale [of Capitol City], Seagram agreed to relocate my two sons and me within a reasonable time as sole proprietors of a similar distributorship located elsewhere." (49a) Counsel for the Lees filed an affidavit in that action unequivocally stating that the oral promise to relocate the plaintiffs was "part of the agreement" by which Seagram purchased Capitol City from the five Lees; that the oral agreement was a "material term" of the agreement by the five Lees to sell Capitol City; and that the claims in this action arise "solely out of the transaction of sale of" Capitol City.[6]

---

6. The affidavit of plaintiffs' counsel states:

"4. In or about September 1970, the five Lees sold the assets and good will of Capitol to Seagram for a sum in excess of $2,000,000. As part of the agreement, Seagram promised to locate Harold S. Lee, Lester Lee, and Eric Lee (the 'three Lees') in another distributorship . . . .

"7. Claims I and II of that action [the S.D.N.Y. action] seek damages and injunctive relief, respectively, for Seagram's breach of the agreement made with the three Lees to relocate them within a reasonable time as sole proprietors of a liquor distributorship located outside the District of Columbia. Such agreement was a material term of the five Lees' agreement to sell their distributorship in the District of Columbia. The claims in the New York action arise solely out of the transaction of sale of the liquor distributorship to Seagram." (51a-52a)

In summary, based upon the sworn statements of the plaintiffs and their counsel and the testimony of plaintiffs at trial, the alleged oral agreement to provide a new distributorship was not merely intimately interwoven with but was integral to the agreement for the sale of Capitol City which was reduced to writing. The alleged oral agreement was part of the consideration for the written contract to sell, and that written contract would not have been executed but for the prior oral agreement alleged by plaintiffs. Indeed, plaintiffs' own evidence is four-square with the allegation of their amended complaint (¶26, 29a) that Seagram's alleged promise to relocate them "was at the heart of the entire transaction, which would not have been entered into without it."

C. As the inducing cause for the execution of the written contract, the alleged oral agreement falls before the parol evidence rule because it is so closely connected with the written contract (indeed, part and parcel thereof) that the parties would ordinarily be expected to embody it in the writing.

In these circumstances, New York's strong parol evidence rule bars proof of the alleged oral agreement. The plaintiffs' own evidence and admissions demonstrate that their oral contract claim is defeated by the three interdependent conditions set forth in *Mitchill* as necessary to avoid the rule.

The New York cases hold that the requirement that the oral agreement must be one the parties would not ordinarily be expected to embody in the writing or not be so clearly connected with the principal transaction as to be part and parcel of it is not satisfied where the oral agreement or commitment induced the plaintiffs to enter into the written contract. In New York, evidence of an oral stipulation which is the inducing cause for a subsequent or contemporaneous written contract is not competent to establish a claim for breach of the oral agreement. See, for example, *Wilson* v. *Deen,* 74 N.Y. 531, 42 N.Y.S. 733 (1878); *Mitchill*

v. *Lath,* 247 N.Y. 377, 160 N.E. 646 (1928); *Fogelson* v. *Rackfay Construction Co.,* 300 N.Y. 334, 90 N.E.2d 881 (1950); *Halloran* v. *N. & C. Contracting Co.,* 249 N.Y. 381, 164 N.E. 324 (1928); *People ex rel. McGoldrick* v. *Regency Park,* 280 App. Div. 804, 113 N.Y.S.2d 172 (2d Dept. 1952), *aff'd per curiam,* 305 N.Y. 650, 112 N.E. 2d 425 (1953); *Binney & Smith, Inc.* v. *41 East 42nd St. Realty Co.,* 147 N.Y.S.2d 243 (Sup. Ct. N.Y. Co. 1955).

In the *Fogelson* case, which denied enforcement of an oral promise by a lessor to provide tenants with bus service (actually rendered for a period of time), Judge Fuld, for a unanimous Court of Appeals, emphasized the conclusion here urged by Seagram:

> "From the tenants themselves in the case before us comes indisputable acknowledgment that the transaction was single and that the oral agreement not only was part of the consideration but was the inducing cause for the execution of the lease itself. In so many words, they said that they would not have signed the leases had the landlords not promised to furnish bus service."[7] (300 N.Y. at 340, 90 N.E.2d at 883-884)

The universal application of New York's parol evidence rule to oral agreements such as plaintiffs claim here is reflected in the unqualified declaration in 22 *N.Y. Juris., Evidence* §630 (1962), that "... in New York the courts, in the absence of a showing of fraud, deny the admissibility of matters of inducement to the making of a written contract for the reason that such matters are so merged in the writing that they are not admissible to vary the writing or show any intent different from that expressed in the instrument." See, also, 30 *Am. Jur. 2d, Evidence* §1051 (1967).

7. Similarly, in *Halloran,* the Court of Appeals held: "The alleged contract to grant the exclusive privilege to solicit customers in the apartment houses was not a contract separate and distinct from the lease; it was part and parcel of the lease .... The lease contains no reference to the privilege and yet the testimony is that the lease would not have been made if the privilege had not been given; that the oral contract was part of the consideration." (249 N.Y. at 384, 164 N.E. at 325)

The federal courts, too, have understood New York's parol evidence rule to bar oral promises which have induced execution of a written contract, concluding that such promises are so closely connected with the principal transaction as to be part and parcel of it. In *Seitz* v. *Brewers' Refrigerating Co.*, 141 U.S. 510 (1891), it was claimed that oral assurance as to the cooling capacity of a machine which induced entry into a written sale contract lacking any such warranty was purely collateral and provable by parol under New York law. The Supreme Court, however, affirmed the lower court's precluding proof of the parol contract, stating that ". . . such an agreement must not only be collateral but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it." (141 U.S. at 517)

In a recent decision by Judge Gurfein, *Plum Tree, Inc.* v. *N. K. Winston Corp.*, 351 F.Supp. 80 (S.D.N.Y. 1972), the plaintiff entered into shopping center leases relying upon certain prior promises by the landlord, *inter alia,* to render assistance and expend money to increase the plaintiff's business. Noting that in *Mitchill,* the Court of Appeals had struck down an oral promise to remove a neighboring ice house which had induced the buyer of the adjacent land to execute the written sale contract, Judge Gurfein held that the parol evidence rule applied and dismissed the contract claim. He stated that an important consideration emerging from the New York authorities was that "even if the oral promise was an inducement for the execution of the written lease, that circumstance does not exempt it from the parol evidence rule."[8] (351 F.Supp. at 84)

These authorities demonstrate that, where, as here, plaintiffs admit that the written contract would not have

8. Federal courts applying the law of various jurisdictions other than New York have also held that an oral agreement which induced entry into a written contract is barred by the parol evidence rule. *E.g., Ford* v. *Luria Steel & Trading Corp.*, 192 F.2d 880, 883-886 (8th Cir. 1951), rejected the claim that "parol evidence is admissible to show a contemporaneous oral agreement on the faith of which a written contract was executed and without which the written contract would not have been entered into."

been made but for the prior or contemporaneous oral agreement, that fact proves that the oral agreement is so clearly connected with the principal transaction embodied in the written contract as to be part and parcel of it and, therefore, one which the courts will find the parties would ordinarily be expected to embody in the writing. Indeed, quoting from *Fogelson* but interpolating the relationship of the parties here as characterized by the plaintiffs, the language of the Court of Appeals (and the comparable language of the courts in the other cases cited) fits this case like the proverbial glove:

> "Where the buyer and seller of a business [Capitol City] enter into a written contract of sale, it is reasonable to expect that it 'contain the engagements of the parties, and . . . define the object and measure the extent of such engagement.' . . . Certainly, where the [oral] promise relates to a matter so closely touching upon the buyer-seller relationship as the buyer's obligation to supply an *assertedly essential* additional consideration—obtaining for or relocating the sellers in another distributorship—the promise must be embodied and contained in the written sale contract itself." (*Cf.* 300 N.Y. at 338-339, 90 N.E.2d at 883)

D. The parol evidence rule precludes proof of the alleged oral agreement, because that agreement contradicts, varies and adds to the consideration expressly provided in the written contract.

As *Mitchill*, *Fogelson*, and the other cases previously cited demonstrate, it is beyond dispute that parol evidence will not be received to contradict, vary or add to the express or implied provisions of a written contract. It is equally clear that parol can not be used to add to or to enlarge the consideration expressly promised in a written contract. *Hutchinson* v. *Ross*, 262 N.Y. 381, 187 N.E. 65 (1933); *Emmett* v. *Pennoyer*, 151 N.Y. 564, 45 N.E. 1041 (1896); *Hocking Valley Railway Co.* v. *Barbour*, 190 App. Div. 341, 179 N.Y.S. 810 (1st Dept. 1920); *Richardson on*

Evidence §608 (10th Ed. 1973) (". . . where the consideration expressed in the instrument is contractual in nature, as where it consists of reciprocal promises to perform, the parol evidence rule applies, and the consideration expressed in the writing can no more be varied by extrinsic evidence than can any other term of the contract"). (*Cf. Mitchill*, 247 N.Y. at 381, 160 N.E. at 647)

In both the written contract for the sale of Capitol City and in the alleged oral agreement, the same consideration —their agreement to sell the business of Capitol City— flowed from the plaintiffs and the other two Lees, Henry and Arthur. In the written contract, Seagram expressly promised to pay $2,500,000 for the purchase of Capitol City and assumed certain other specified obligations. The plaintiffs, however, would contradict and vary those express written provisions by adding to and enlarging Seagram's obligations to include a new distributorship for the plaintiffs. As the cited authorities hold, the parol evidence rule does not permit such contradiction and enlargement of the express consideration provided in the written contract.

E. The parol evidence rule precludes proof of the alleged oral agreement, because that agreement was not collateral to the written contract inasmuch as it was not separate, independent and complete, with no part committed to writing.

Collateral oral agreements, even though made contemporaneously, are not included within the prohibition of the parol evidence rule "because they are separate, independent and complete contracts, although relating to the same subject. They are allowed to be proved by parol because they were made by parol, and no part thereof committed to writing." (*Thomas* v. *Scutt*, 127 N.Y. 133, 140-141, 27 N.E. 961, 963 (1891)) On the facts of this case, there can be no persuasive contention that the alleged oral contract was separate and independent, with no part reduced to writing.

The obligation of plaintiffs and the other two Lees, *i.e.*, their agreement to the sale of the business of Capitol City, was the same under both the written contract and the al-

leged oral agreement. In addition, upon the sworn statements of the plaintiffs and their counsel, not only was Seagram's obligation with respect to a new distributorship a "material term" and "part of the agreement" for the sale of Capitol City,[9] but the plaintiffs also admit that they would not have entered into the written sale contract without Seagram's alleged oral commitment. Thus, the agreement by the plaintiffs and the other two Lees to sell Capitol City was wholly dependent upon the alleged oral agreement to relocate Lester and Eric, so that by no definition could that oral agreement be collateral in the sense required to avoid the parol evidence rule (*i.e.*, a separate, independent and complete agreement). Based upon plaintiffs' own characterizations, the alleged oral agreement was not only "so clearly connected with the principal transaction as to be part and parcel of it," but patently there was a single, indivisible transaction, one leg of which could not move without the other.

F. In rejecting the parol evidence rule, the court below disregarded the evidence and plaintiffs' characterization of the alleged oral agreement as the inducing cause of the written contract and relied upon inapposite precedents.

The court below concluded that several factors supported its conclusion "that the oral agreement to relocate plantiffs in another liquor distributorship was a collateral agreement," not inconsistent with the terms of the written agreement for the sale of the assets of Capitol City and not so clearly connected with that transaction as to be part and parcel of it. (110a-112a) The factors outlined to support that conclusion, however, are contrary to the plaintiffs' own testimony and characterization of the alleged oral

---

9. In *Plum Tree, Inc.* v. *N. K. Winston Corp.*, 351 F. Supp. 80, 83-84 (S.D.N.Y. 1972), Judge Gurfein applied the same analysis, holding, "Here we do not even have a collateral agreement in form. The [oral] promises said to have been broken are promises that are an integral part of the obligations ascribed to the landlord in the operation of the lease."

agreement and the court's conclusions are untenable in light of the controlling decisions.

1. In concluding that "the subject matter of the oral contract was different from the subject matter of the written contract although they arose generally out of the same factual fabric" (110a-111a), the court stated:

> "The oral contract was an agreement which obligated defendant to use its best efforts to provide plaintiffs with the opportunity to purchase another liquor distributorship. In return, plaintiffs would agree to the sale of their interest in Capitol City. The written agreement obligated defendant to pay a sum of money in return for which plaintiffs and Henry and Arthur Lee were to convey the assets of Capitol City to defendant. While defendant maintains that the oral agreement merely expanded the consideration for the written contract, it is clear that each contract contained a separate and distinct set of mutual promises."

As discussed hereafter, the written contract embodied far more obligations on both sides than just the payment of a sum of money for the business of Capitol City (including individual obligations upon only some of the five Lees), thus demonstrating that the written contract must be presumed to be a complete integration of all the terms and conditions related, let alone essential, to the sale. Apart from that fact, there is absolutely no evidence of record from which the alleged oral contract could be limited to the plaintiffs' agreement "to the sale of their interest in Capitol City."

As previously noted, Harold Lee first determined the willingness of all five Lees to sell. Thereafter, he testified, he told Yogman, "Jack, this is getting to be an unwieldy *family. . . .* [*W*]*e will sell you the house* providing we can arrive at a satisfactory price but under no conditions is the house for sale unless Eric and Lester will be relocated." (132a) At no time did Harold Lee claim that the alleged oral contract was restricted just to the plaintiffs' agree-

ment to the sale of their interest,[10] and it is patently absurd to assume that Seagram would have been interested in a 50 percent interest or anything less than all of the business of Capitol City. Indeed, elsewhere in his opinion, the trial judge correctly characterized the record as showing that

> "Plaintiffs and the other owners of Capitol City became desirous of selling their respective interests in the business and . . . Harold Lee discussed the possible sale of Capitol City with Jack Yogman. . . . Plaintiffs contend that Lee offered to sell Capitol City to Seagram, but conditioned the offer on Seagram's promise to relocate plaintiffs in a new distributorship of their own." (95a)

Thus, the evidence of record shows that the agreement of plaintiffs *and Henry and Arthur* to sell was consideration flowing to Seagram in both the alleged oral and the written contracts, and it is wholly erroneous to say, as the court below did, that "each contract contained a separate and distinct set of mutual promises."

2. In response to plaintiffs' urging that *Hicks* v. *Bush*, 10 N.Y. 2d 488, 180 N.E.2d 425 (1962), precluded application of the parol evidence rule on the facts here, the trial judge erroneously relied upon that decision as the second factor in support of his ultimate conclusion, stating:

> "Additionally, while defendant characterizes the oral agreement as part and parcel of the written contract due to the fact that the agreement to relocate was in the nature of a condition precedent[11] to the sale of

10. If the alleged oral contract had been premised only upon the plaintiffs' agreement to sell their 50 percent of Capitol City's stock, then their part of that agreement was never performed because Seagram bought the assets and the plaintiffs retained their stock until the corporation was liquidated (under the name of Lee Industries, Inc.). (179a-180a). Moreover, plaintiffs could not agree to sell their interest alone because, as Harold Lee testified, the stock was subject to restrictive agreements preventing sales to outsiders. (127a-128a)

11. Seagram never suggested that the oral agreement was a condition precedent to the written contract's becoming a valid and effective, binding contract.

plaintiffs' interest in Capitol City, this will not alter the collateral nature of the agreements." (111a)

Hicks is totally inapposite on the facts of this case. It held that parol was admissible solely to prove that a written contract, apparently valid, complete and enforceable on its face, was by stipulation of the parties never intended to become effective unless and until an event orally agreed to occurred—a true condition precedent.[12] Parol, therefore, was admissible not to contradict, vary or add to the terms of the writing, contrary to the parol evidence rule, but instead only to show that the written contract never came into existence and had no legal force or effect on either party. See *Thomas* v. *Scutt*, 127 N.Y. 133, 137-138, 27 N.E. 961, 962 (1891); 4 *Bender's New York Evidence*, §252.05 (1975).

Here there has never been any claim by the plaintiffs that the alleged oral agreement obligated Seagram to relocate Lester and Eric Lee before the written sale contract would become legally effective or that any other event was a condition precedent to the validity of that written contract.

3. Several other factors, "each less than critical when viewed alone," the trial judge declared, "lend weight to the Court's conclusion when viewed together." (111a)

a. "First, the parties to the two agreements were different," he stated. Seagram, however, was a party to both agreements. As noted previously, Harold Lee's testimony was that his offer, which led to the alleged oral agreement, was on behalf of all the Lees and for the sale of all of Capitol City, so that all five Lees were parties in interest to the oral agreement even if only the plaintiffs were the beneficiaries of the additional obligation upon Seagram to relocate them. Even if that had not been the case, however, the written contract of sale imposed certain obligations upon only some of the five Lees, leading to the

12. "Parol testimony is admissible to prove a condition precedent to the legal effectiveness of a written agreement . . . if the condition does not contradict the express terms of such written agreement." (10 N.Y.2d at 491, 180 N.E.2d at 427)

presumption that it integrated all terms, conditions and obligations related to the sale, however ancillary or secondary and whether or not redounding to the benefit of or obligating only certain of the five Lees.

b. "Second, the defendant was represented in the negotiation of the oral contract by Mr. Yogman alone, while the written contract was negotiated for defendant by Messrs. Barth, O'Brien and Fieldsteel," the court below noted. Seagram, however, a single corporate entity and indivisible legal personality, was party to the written sale contract and allegedly to the oral agreement. Indeed, plaintiffs' cause of action requires attribution to Seagram of knowledge of the alleged oral offer which is claimed to have been accepted by the time Barth, O'Brien and Fieldsteel negotiated the written sale contract, concededly without Harold Lee or any of the plaintiffs advising them of the commitment to relocate. Patently, Harold Lee, who participated in the "negotiation of both agreements" knew of the relocation commitment, and it is his failure to memorialize in the written instruments that vital condition, which was the inducing cause of the written sale contract, that brings into play the parol evidence rule. The fact that he dealt with different agents of the corporation as to different terms of the overall, unitary agreement does not vitiate the rule.

c. "Next, the written contract between the parties contained no integration clause," the trial judge said. The absence of a merger clause, however, is not controlling and will not avoid application of the parol evidence rule in circumstances such as those of this case.[13] See, for exam-

13. As stated in 4 *Williston on Contracts* §811 (3d Ed. 1960): "In most of the situations involving the application of a merger clause the presence of the clause is only an additional reason for reaching the same result that would be reached without it on the basis of the parol evidence rule. Thus the numerous decisions holding that the clause prevents the use of parol evidence of a prior or contemporaneous promise not contained in the writing on the theory that such a promise is contradictory as well as additional to the writing could have been sustained by the parol evidence rule alone, since the oral promise would still be additional if not contradictory." (*Accord, Fogelson, supra,* 300 N.Y. at 340, 90 N.E.2d at 884)

ple, *Sabo* v. *Delman,* 3 N.Y.2d 148, 143 N.E.2d 901 (1957). Rather than ascribing any conclusive weight to the presence or absence of a merger clause, the courts examine a written agreement to determine whether, in all the circumstances, it *appears* to be a complete and integrated memorial of the parties' commitments, in which event it is *presumed* to contain their entire agreement. The contract must appear on its face to be incomplete in order to permit parol evidence of additional terms, and those terms must be consistent with the written instrument.[14]

Here the written agreement and amendments (PX 7 and 9, E33 and E38) covering the sale of Capitol City's assets and good-will, as well as other subjects related to the parties' overall agreement, do so in "great detail" resulting from extensive negotiations, as the court below noted. (107a) While not containing the standard integration clause (*i.e.,* a provision that the contract "contains the entire agreement of the parties"), this written contract does open with the statement, "In consideration of the mutual promises herein contained, it is agreed and covenanted as follows." A series of obligations on the part of both sides is then defined, including several transcending the mere transfor of Capitol City's assets.

For example, the instrument provides for a lease of Capitol City's building, which was separately owned by Lester, Eric and Arthur Lee, who negotiated the amount of rent to be paid to them ($60,000 annually) and Seagram's obligations as lessee for maintenance and taxes and who initiated amendments with respect to these matters. (249a, 406a-407a, 415a) The written contract also includes individual commitments and warranties by the five Lees. It includes a consulting obligation on the part of Harold Lee. The tangible personal property to be conveyed is specified. The purchase price and the procedure for adjusting that price to reflect changes in book value up to the closing are detailed. All the conditions and terms of

---

14. *Eighmie* v. *Taylor,* 98 N.Y. 288, 294 (1885); *Thomas* v. *Scutt,* 127 N.Y. 133, 138, 27 N.E. 961 (1891); *Edison Electric Illuminating Co.* v. *Thacher,* 229 N.Y. 172, 128 N.E. 124 (1920); *Seitz* v. *Brewers' Refrigerating Co.,* 141 U.S. 510, 517 (1891).

the overall transaction are clearly and unambiguously stated.

The contract closes with the acknowledgment that the signatures of the five Lees signify that "the foregoing correctly sets forth your understanding of our Agreement." On its face this instrument and the amendments thereto are a complete contract. As a matter of law, there is a presumption that the parties intended to integrate in this written contract every agreement relating to the nature or extent of their understandings, certainly including any consideration so substantial as to be the essential inducing cause for the agreement to sell Capitol City—the alleged obligation to relocate the plaintiffs without which they would not have executed the written contract.

4. The court below cited *Gem Corrugated Box Corp. v. National Kraft Container Corp.*, 427 F.2d 499 (2d Cir. 1970), mistakenly describing it as a case where the "alleged *inducement* to enter into [a written requirements contract for the purchase of box materials from the defendant] *was an oral agreement* allowing plaintiff to purchase as many shares of defendant's common stock as it wished," and concluding "that the facts of the instant case comport more closely with the facts in *Gem*" than those in *Mitchill* and *Fogelson*. (110a)

The parol evidence rule had no applicability in *Gem*, because, *inter alia*, as this Court's detailed statement of the facts shows, the oral agreement there neither preceded nor was contemporaneous with the written requirements contract executed on November 25, 1959.[15] Not until at

15. "On July 10, 1959, Kipnis met with the jobbers to announce a revised plan under which . . . each jobber would become a stockholder of National Kraft, able to purchase as many shares as it wished upon entering into a contract to purchase its corrugated paper products requirements from National Kraft. . . .

"Plaintiff maintained its interest in the new plan. During the following months discussions of particulars continued. . . .

"On November 25, 1959, plaintiff entered into a written contract with National Kraft to purchase its box materials requirements for a period of five years. The contract price was not attractive; consummation of the stock purchase agreement was the oral inducement

(footnote continued on next page)

least three months thereafter (during which time such vital elements of the stock transaction as the price were still under discussion) did the oral agreement come into being as a binding obligation. Until that time there had been only an offer by the defendant to sell stock if the plaintiff first entered into the written requirements contract, and even as of the date of the written contract plaintiff neither had accepted the stock offer nor was obligated to do so.

Thus, in *Gem,* the facts were wholly distinguishable from those here, because the mere offer of an opportunity to consummate a stock purchase agreement at a later date was the inducement which preceded and led to the written contract there. There was no prior or contemporaneous oral agreement such as plaintiffs allege bound Seagram—an oral agreement which the New York courts refuse to enforce because it was allegedly the inducing cause for the written contract. In *Gem,* therefore, unlike this case and *Fogelson, Mitchill, Plum Tree*[16] and the other authorities cited previously, there was no prior or contemporaneous, allegedly binding oral agreement without which the plaintiffs would not have entered into the written contract.

---

to enter into the requirements contract. At the urging of Kipnis, however, consummation of the stock purchase transaction was postponed. . . .

"Further meetings took place in connection with the stock purchase phase of the overall plan. Plaintiff was discomfited to learn that the bargain price of 'cost' to Kipnis at which it was to purchase [included valuations in addition to] actual cash investment by Kipnis; but eventually, in March 1960, plaintiff communicated its intention of purchasing 7,000 shares. . . .

". . . *Plaintiff's ultimate request for 7,000 National Kraft shares operated as an acceptance of the offer* to sell plaintiff as many shares as it wished in consideration for plaintiff's entering into the requirements purchase contract. The proposed sale of stock was not merely an ancillary, contemporaneous agreement; it was the vital element of the overall transaction. . . ." (427 F.2d 502-503)

16. Judge Gurfein's decision in *Plum Tree* followed by some two years this Court's decision in *Gem.* Judge Gurfein not only applied the parol evidence rule to an oral promise which allegedly induced the written contract, but he apparently found *Gem* to be so distinguishable and without controlling impact as not to require citation or analysis.

POINT II

The alleged oral agreement is so vague and indefinite as to be unenforceable.

Even if the alleged oral agreement could survive the bar of the parol evidence rule, the evidence and the trial court's jury instructions establish that the agreement found by the jury was so vague and indefinite with respect to Seagram's obligation as to be unenforceable. Adopting plaintiffs' proposed instructions (Nos. 26 and 28, 56a-57a) almost verbatim, the court below instructed the jury:

> "... Plaintiffs contend that they entered into an oral agreement with defendant which provided that ... [Seagram], within a reasonable time, *would provide* the plaintiffs a Seagram distributorship whose price would require roughly an amount equal to the capital obtained by the plaintiffs from the sale of their interest in Capitol City, and which distributorship would be in a location acceptable to plaintiffs .... Therefore, in order for plaintiffs to prevail on their claim for breach of contract, you must first find by a preponderance of the evidence either that:
>
> "(1) Defendant said in express language that if plaintiffs would sell their interest in Capitol City, defendant in return *would provide for them a distributorship financially and geographically acceptable to them;* or
>
> "(2) For selling their interest in Capitol City, plaintiffs made clear to defendant, if plaintiffs did sell their interest, defendant in return would be required *to provide them with an acceptable distributorship,* and that, thereafter, by purchasing Capitol City, defendant conducted itself in such a manner that its assent to that condition may fairly be inferred." (451a-452a)

Plaintiffs' sole proof of the terms of the alleged oral contract is the testimony of Harold Lee, the only witness

to that claimed agreement. As previously quoted, he testified that in early June, 1970, he told Yogman that the Lee families would sell Capitol City, but only on the condition that Lester and Eric be "relocated" in another distributorship. No further specification was given except that the new house should be exclusive in its market, if possible. (132a-134a) There was no discussion of relocation terms with Yogman, Harold Lee testified, because the Lees "didn't know whether we could agree on a sale," and the meeting was concluded with neither a commitment nor expression of interest by Yogman. (135a-136a) The alleged acceptance by Seagram of its obligation, whatever that may have been, was effected thereafter without any further specification of its nature or the manner in which it was to be discharged.[17] These are the sole facts as to offer and acceptance and communication between the parties from which a contract must be inferred.

Seagram submits that an agreement either to "relocate" Lester and Eric Lee in some other distributorship, as Harold Lee testified, or to "provide" them with such a house, as the court charged the jury, is so vague as to be unenforceable. As the trial judge concluded, Seagram does not own distributorships (102a), and Lester Lee conceded that Seagram was not obligated to give or sell a

17. After Harold Lee's conversation with Yogman, Barth visited Lee in Washington to inquire whether Capitol City could be purchased. This inquiry, according to Lee, constituted a "tacit" acceptance of the condition that his sons be relocated, but he did not discuss relocation with Barth or any of the terms of the sale of Capitol City [illegible]. [T]here was no discussion of any kind, because [Barth] di[illegible]ve any authority, nor were we prepared for it." (137a) [illegible] the extensive negotiations in the weeks before the sale, no ment[illegible] the relocation of Lester and Eric Lee was made to any representative of Seagram in any context or at any time, and there was never any reference to the time for Seagram's performance, the location of the distributorship, which brands it would carry, its profits sales volume, growth trend or price. (132a, 135a-136a, 140a, 141a, 143a-144a, 177a-178a, 240a-241a, 249a-250a, 381a-382a, 384a-385a, 389a, 406a, 416a; DX E. E114)

house to plaintiffs.[18] (196a-197a) Further, plaintiffs conceded that Seagram was not obligated to assist them in financing any purchase of a distributorship. (234a)

Before trial, plaintiffs' position, sworn to in their answers to interrogatories (DX E, E114), was that Seagram nevertheless was obligated to do more than merely give them notice of the availability of distributorships for sale. There is, however, no adequate delineation on the record of what that obligation was, and neither Seagram nor the jury or court could have understood what Seagram was required to do where, in the context of this industry, plaintiffs and an independent distributor would have to negotiate and reach agreement if any purchase were to be made.[19] There is simply no evidence from which the jury could find what Seagram had to do to satisfy the asserted obligation to "provide" a house, as the jury was instructed it must find, let alone what was embodied in the alleged obligation to "relocate" his sons, which was the sole obligation as to which Harold Lee testified.

The utter vagueness of Seagram's asserted obligation is compounded by the jury instructions proposed by the

18. The amended complaint alleges (¶¶27, 28, 29a-30a) that Seagram delayed performance and breached the alleged contract by withholding consent to plaintiffs' purchase of a Rhode Island House (Eddy & Fisher), owned by Lawrence Paley, and by "unlawfully refusing to sell to the plaintiffs any of the several distributorships which it controls." With respect to Paley's house, Lester Lee conceded that Seagram was *not* obligated to provide that distributorship or any particular house. (211a) Not only does the record fail to show that Seagram controls and could sell or cause the sale of any distributorship, but plaintiffs requested no instruction submitting any such issue to the jury, and none was given. Plaintiffs testified, instead, that they were to purchase a house from among "the many that became available." (197a) They also conceded that Seagram was not obligated to use unlawful means to obtain a distributorship for them. (DX E, E114) Forcing a sale by an independent distributor would be a tortious interference with business relations and, in New York, could even constitute criminal conduct. (N.Y. Penal Law §155.05-2(e)(ix) (McKinney 1967))

19. Lester Lee testified that it was contemplated by the plaintiffs that they would buy a house from a third party. The terms of sale were to be negotiated by and be mutually acceptable to plaintiffs and that third party. (196a-197a)

plaintiffs and given by the court that the new distributorship Seagram was to "provide" must be acceptable to the plaintiffs. This element of acceptability goes far beyond the testimony of Harold Lee, the only witness to the alleged oral agreement. While no witness other than Harold Lee could testify to what the terms of that agreement were, Lester Lee testified as to a series of criteria which any distributorship must possess to be acceptable to the plaintiffs.

For example, he declared that the location of the promised distributorship had to be acceptable to him, his wife, and his brother, Eric. (197a-200a) He testified further that, in deciding whether to purchase and what price to pay for a distributorship, a host of factors would have to be evaluated—sales volume and trend, profit trend and potential, extrinsic factors in the particular market served, the supplier franchises held by the new house and brands carried, lost or in jeopardy, the willingness of all the suppliers to transfer franchises, and so on. (186a-191a) Accordingly, plaintiffs' evaluation of all these factors would determine the acceptability to them of any new house and their willingness to buy, making it impossible to define what kind of distributorship Seagram was obligated to "provide." Moreover, Lester Lee conceded that these factors essential to acceptability to the plaintiffs had not been communicated to Seagram. (200a-204a, 211a)

Indeed, Lester Lee testified that plaintiffs were unable to say that they would have been willing and able to buy any of the 43 houses shown of record to have changed hands through 1974, including the only 9 with locations acceptable to them, because the sole record information as to any of them (wtih one exception[20]) was its net sales and after-tax profits for just one year. (167a-168a, 203a-209a, 217a-218a, 238a-239a; PX 49, E97) Eric Lee agreed that such data were insufficient. (239a-240a).

20. The one exception is Paley's Rhode Island house, but the only additional evidence is that it was purchased in 1973 (long after this action was initiated) for a price plaintiffs were presumably able to pay. Plaintiffs admitted, however, that they would have had to know more about Paley's house, too, before they could conclude that it would be acceptable to them. (169a-170a, 206a-208a, 238a-240a, 250a-251a)

In these circumstances, the alleged oral agreement left the decision as to what was acceptable to plaintiffs' discretion, and Seagram neither knew nor could have known what distributorships would have been geographically and otherwise acceptable to plaintiffs. Indeed, plaintiffs could not identify any house that would have been acceptable to them. Their own testimony establishes that what distributorship might have been acceptable and, therefore, what Seagram was obligated to "provide," on the instructions given to the jury, were impossible to define. Such an agreement is so vague and indefinite as to be legally unenforceable.

When he reserved decision on Seagram's motion for a directed verdict after all the proof was in, the trial judge, with the evidence fresh in his mind, expressed his grave concern that the alleged oral agreement to relocate Lester and Eric Lee was so vague as to be unenforceable:

> "The thing that concerns me in this case, where even if I reserve on the motion for directed verdict and let the case go to the jury, what troubles me here is that even assuming that the jury found that there was some agreement to provide a distributorship, whether the agreement was so vague as to be unenforceable. . . . That is the point that troubles me. . . . I think that even if I found the contract existed here, it is so vague that, [as] has been brought out by the testimony of one of the boys at least, that it is almost impossible to define what obligation Seagram had. Now, that is the quandry I find myself in in reserving and letting the case go to the jury. . . ." (438a)

Thereafter the judge stated, "Frankly, I have strong reservations about this case, but there is always a remedy if I am wrong and maybe the best thing to do is let it go to the jury." (443a-444a)

With deference, Seagram submits that the opinion rendered in denying its motion for judgment notwithstanding the verdict demonstrates that the court below remained unable to define Seagram's obligation. That opinion alternatively defines Seagram's obligation as one (a) ". . . to

relocate the two younger Lees in a new distributorship" (116a), (b) ". . . to provide the Lees with the opportunity . . . to purchase one of a finite number of wholesale distributorships" (99a) or ". . . to use its best efforts to provide plaintiffs with the opportunity to purchase another liquor distributorship" (110a), and (c) " . . . merely to notify plaintiffs as [Seagram] learned of distributors who were considering the sale of their business." (102a) The lower court's post-trial opinion wholly ignores the basis upon which the case was submitted to the jury, *i.e.*, with instructions that to hold Seagram liable the jury must find an agreement to "provide" a new distributorship acceptable to the plaintiffs.

In ruling that the alleged oral agreement was not so vague and indefinite as to be unenforceable, the court below concluded that Seagram's obligation was merely to notify plaintiffs of houses it knew to be available.[21] (102a) This conclusion—wholly contrary to Harold Lee's testimony that Seagram was to "relocate" Lester and Eric and equally opposed to plaintiffs' pretrial sworn statement that Seagram was obligated to do more than merely give them notice of the availability of houses for sale (DX E, E114) —was apparently responsive to the testimony of Eric Lee. Though not a witness to the alleged oral agreement, Eric testified that it was his opinion or understanding of the agreement that Seagram was obligated only to "put us in touch with distributors who were willing to sell their

21. The court also ruled that while ". . . plaintiffs had a broad discretion in surveying the opportunities of which Seagram was to notify them, and an equally broad discretion as to whether or not to purchase, . . . [this] will not defeat enforcement. *Plaintiffs could not arbitrarily reject opportunities called to their attention by defendant. Were they to have done so, they would have been liable in an action for damages.*" (103a) Apart from the total absence of any evidence from which it could be inferred that the alleged oral agreement obligated plaintiffs to buy any distributorship (whether from Seagram, or "provided" by Seagram, or from a willing distributor identified by Seagram), the trial court's inexplicable conclusion that plaintiffs could be liable for their failure to purchase a distributorship, whether arbitrarily or not, emphasizes the court's inability to define any obligation on the part of Seagram not measured solely and completely in terms of what would be acceptable to plaintiffs.

businesses, and upon the consummation of the deal, [Seagram] would agree to the transfer of their franchises to the new owners.'"[22] It was his understanding, he testified, that the profit potential and price for the new house were to approximate one-half the comparable figures for Capitol City. (234a)

This testimony and the lower court's post-trial conclusion all but characterize Seagram's obligation under the alleged oral agreement as that of a business broker or finder. If that was Seagram's obligation, however, there are insurmountable problems with plaintiffs' theory and proof of liability. First, no principle of law holds a broker or finder liable for the failure to find a business opportunity acceptable to the prospective purchaser.[23] Second, plaintiffs offered no evidence that Seagram failed to notify them of any distributorship which Seagram knew was available for sale before it was in fact sold or the seller had found his own buyer and was negotiating the sale,[24] and there is uncontradicted evidence (including testimony by plaintiffs) that Seagram did advise them of houses which might be for sale. (144a-145a, 168a-171a, 174a-175a, 183a-184a, 193a-194a, 216a, 243a, 343a-344a, 358a-362a, 365a-

22. Seagram's asserted obligation under the alleged agreement to consent to the transfer of its franchises was an involvement no greater than that of any other distiller, vintner, brewer, or soft drink and soda supplier to the new house, since the consent of such suppliers to the transfer of their franchises upon the plaintiffs' purchase of any new distributorship would also be essential. As Lester Lee testified, the plaintiffs would not be interested in a distributorship where non-Seagram franchises would not be transferred to them (187a-190a)

23. *Siegel* v. *Rosenzweig*, 129 App. Div. 547, 114 N.Y.S. 179 (2d Dept. 1908); Biskind and Barasch, *Law of Real Estate Brokers* §110.03 (1969).

24. The only distributorship in a location acceptable to plaintiffs which changed hands before plaintiffs brought this lawsuit and which Seagram knew of in advance but plaintiffs did not was Pacific Crown in San Francisco. That was not, however, the sale of a going concern. Rather it was the merger of an insolvent distributorship, Bareaux, into another distributorship owned by Henry Berman, the successor being named Pacific Crown. This transaction was conceived and arranged by McKesson & Robbins, which notified Seagram and inquired about the feasibility of transfer of Seagram's franchise to the new entity. (360a-361a)

366a, 374a-375a) Finally, the jury was instructed that it could find that Seagram had breached the alleged oral agreement only if it concluded that Seagram did not in fact provide an acceptable new house within a reasonable time. (454a455a) Contrary to the lower court's post-trial conclusion that Seagram's obligation was merely to notify plaintiffs of houses it knew to be available, the jury was *not* instructed that absent proof that Seagram knew of available houses and then failed to notify plaintiffs there could be no breach of any such agreement.

In summary, if the court's post-trial conclusion that Seagram was obligated merely to put plaintiffs in touch with distributors who might be willing to sell were correct, patently such an agreement could not be inferred to obligate Seagram to "provide" or obtain a house acceptable to them, as the jury was instructed it must find. On the other hand, if Seagram's obligation was greater than that of a broker or finder, that obligation has not been defined, and how Seagram was to perform—particularly the requirement to "provide" a house acceptable to plaintiffs—is not determinable.

> "The problem of whether an agreement is sufficiently definite is a delicate one and it would be difficult to lay down a helpful general rule. The facts of an individual case are of decisive importance. The agreement need not be so definite that all the possibilities that might occur to a party in bad faith are explicitly provided for but it must be sufficiently complete so that the parties in good faith can find in the agreement words that will fairly define their respective duties and responsibilities." *Mason* v. *Rose,* 85 F.Supp. 300, 311 (S.D.N.Y. 1948), *aff'd,* 176 F.2d 486 (2d Cir. 1949).

As this Court said in reviewing that case, ". . . a contract must be definite enough for a court to be able to ascertain what is the stipulated performance. (176 F.2d at 489)

While the particular facts of each case are of decisive importance, analogous cases illustrate the application of

the long-standing rule[25] requiring certainty of contractual obligations to facts similar to those at bar. In applying New York law to an alleged agreement to obtain additional financing for a corporation, an obligation so lacking in limits for defendants' performance that it was described as a "blank check," it was held in *Sivera* v. *Safra*, 79 Misc. 2d 919, 921, 361 N.Y.S.2d 250, 253 (Sup. Ct. N.Y. Co. 1974), that "The promise of the defendants to refinance Champion by adding capital and arranging for additional financing lack the elements for an enforceable agreement since they are vague and indefinite."[26]

Judge Weinfeld, in reviewing a written joint venture agreement to exploit oil concessions, found the contract to be unenforceable for vagueness, because an essential term required the subsequent mutual agrement of the parties. (*Allen & Company* v. *Occidental Petroleum Corporation*, 382 F.Supp. 1952, 1958 (S.D.N.Y. 1974), *aff'd*, 519 F.2d 788 (2d Cir. 1975)) (". . . [E]ven assuming that the parties intended to be bound by their arrangement, costs, an essential term thereof, upon which the parties never reached an agreement, is so indefinite that the contract is unenforceable. If, the parties failed to 'mutually agree' on the costs to be charged against the venture, upon what basis could a court fill in that essential term?")

In a fact context strikingly analogous to the alleged oral agreement and written contract nexus of this case, in *Garcin* v. *Granville Iron Corp., Inc.*, 137 Misc. 648, 244 N.Y.S. 145 (Sup. Ct. N.Y. Co. 1930), a corporation claimed that a prior oral understanding obligated an individual, who held its note given pursuant to a detailed written contract specify-

25. "A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. It is not enough that they have actually agreed, if their expressions are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, may prevent the creation of an enforceable contract." 1 *Corbin on Contracts*, §95. This has long been the rule in New York. *United Press* v. *New York Press Co.*, 169 N.Y. 406, 58 N.E. 527 (1900)

26. See, also, *Lucas* v. *Federal Reserve Bank of Richmond*, 59 F.2d 617 (4th Cir. 1932); *Transamerica Equipment Leasing Corp.* v. *Union Bank*, 426 F.2d 273 (9th Cir. 1970).

ing the exact amount to be loaned by the individual, to finance the corporation generally "for large sums of money as might be required." While deciding the case on other grounds, the court stated that, even if the parol evidence rule did not bar the alleged oral agreement, that agreement "... appears to be so vague and uncertain in its terms as to be unenforceable." (137 Misc. at 650, 244 N.Y.S. at 148)

In the case at bar, the objective of the alleged oral agreement, the "relocation" of the plaintiffs or "providing" them with an acceptable house, depended upon whether they could "mutually agree" on terms of sale with a third party, the owner of some other distributorship who was willing to sell. (196a-197a) Acting in the best of faith, Seagram would have had no control over this eventuality or the availability of a house acceptable to plaintiffs —essential matters which the alleged agreement necessarily left open. Returning to the principle enunciated in *Mason* v. *Rose,* what could Seagram or a court perceive Seagram's obligation to be? If that obligation can be given any meaning, it can be no more than the new definition articulated by the District Court in its post-trial opinion. The jury, however, was not instructed that Seagram was obligated merely to notify plaintiffs of distributorships which might be for sale or that it must find that Seagram had failed to notify plaintiffs when it had knowledge of available houses. In fact, the record shows that Seagram gave such notice and is devoid of evidence that Seagram failed, in any instance, to notify plaintiffs when it had advance information that a house was for sale.

For all of the above reasons, plaintiffs' alleged oral contract is subject to the same fatal infirmity found in *Bushwick-Decatur Motors* v. *Ford Motor Company,* 30 F. Supp. 917, 924 (E.D.N.Y. 1940), *aff'd,* 116 F.2d 675 (2d Cir. 1940).

> "Even if it be held that the alleged oral agreement in question was legally made, the terms of the alleged agreement 'a more profitable territory' will be allocated when one became available, and 'as soon as a better territory became available,' it would be allocated to plaintiff, are too indefinite, vague and uncertain to constitute an enforceable contract."

POINT III

Plaintiffs' proof of damages is speculative and incompetent.

Plaintiffs' damage evidence, although nominally comprised of four elements, is grounded on two basic assumptions: (a) that Seagram had an absolute obligation to "provide" plaintiffs with an "acceptable" distributorship not later than September, 1971, and (b) that plaintiffs would have purchased it. Plaintiffs' expert, an accountant, arbitrarily equated an "acceptable" distributorship with a hypothetical house which would cost and be worth exactly one-half of the proceeds from the sale of Capitol City, which would enjoy one-half the profits earned by Capitol City in the last year the Lees owned it (its best year), and which would experience growth in the value of its good will at the same rate previously experienced by Capitol City. (280a-282a)

Seagram interposed a continuing objection to this testimony in its entirety (269a-270a, 286a), because it is unrelated to any obligation Seagram allegedly assumed or which could reasonably be inferred from the evidence. The damage evidence was incompetent, first, on the ground that the oral agreement alleged was so vague as to be unenforceable. Thus, damages could not be computed, as was the case in *Koufman* v. *International Business Machines Corp.*, 295 F. Supp. 784, 788 (S.D.N.Y. 1969), where the court stated:

> "In the case at bar, it would be impossible to decree specific performance because the court is unable to determine what IBM agreed to perform. For the same reason, it would be impossible to award damages. . . ."

Second, assuming, *arguendo,* that Seagram's obligation was merely to put plaintiffs in touch with distributors considering the sale of their businesses, as Eric Lee testified and as the court below, contrary to its jury instructions, concluded in its post-trial opinion (102a), then evidence of

the loss of profits or other benefit that might have been gained from an "acceptable" new house would not be competent to measure the damages from any breach of such a contract. Indeed, plaintiffs' expert agreed with that conclusion, testifying that his calculations would not be applicable to the breach of a contract to put plaintiffs in touch with prospective sellers.[27]

Third, even if Seagram had an absolute obligation to provide plaintiffs with an acceptable house and they would have bought it, as their expert assumed, his reliance upon the hypothetical house, "Capitol City divided by two," as the arbitrary model to measure the alleged loss of profits that would otherwise have been earned from the wholly unidentified new house was nonetheless speculative and incompetent on the evidence of record, because plaintiffs claimed that Seagram was obligated to "provide" them with one of a *finite* number of *existing* houses which changed hands each year. (197a, 202a; DX E, E121-E122) They identified 9 existing distributorships as geographically acceptable, but they offered no evidence on the basis of which plaintiffs could show their willingness and ability to buy those houses and the profits they would have earned from any of them. Their limited number made such proof feasible as to some if not all of those houses, and, contrary to the lower court's conclusion (119a), no breach by Seagram of any obligation (however defined) precluded such proof or justified admitting wholly speculative calculations based upon a hypothetical house in no way shown to resemble the existing houses which had been available.

Finally, whatever Seagram's obligation allegedly was, the damage evidence was incompetent in that it was based upon the measure of damages for destruction or injury to a business rather than upon the measure of damages proper for breach of a contract to sell or to provide a business for sale (*i.e.*, the difference in the agreed cost of such purchase and the value of the business that would have been

---

27. "Providing an opportunity [to purchase] is a finite, definite result. Putting somebody in touch would not be the same thing." (320a)

obtained but for the breach). In essence, plaintiffs have erroneously adopted an amalgam of the "before and after" and "yardstick" measures of damage born of antitrust litigation.[28] They have taken Capitol City's most profitable past year and used it as the yardstick to measure the potential profits of an entirely new and different distributorship in a different location and with different management (*i.e.*, without Harold, Henry and Arthur Lee)—a distributorship not shown to resemble Capitol City other than by the arbitrary assumption that its price, profits and worth would be one-half those of Capitol City.

Loss of profits, however, is not the proper measure of damages, because plaintiffs are not claiming injury to or destruction of the earning capacity of any business. They allege that Seagram was obligated to provide them with a house for which they would pay the $1,250,000 they received for the sale of Capitol City—a house presumptively worth just what they would pay for it. Consequently, even if Seagram had been obligated to provide them with such a house, its failure to do so resulted in no damage since the value of the house Seagram failed to provide can not be shown or assumed to be greater than the price plaintiffs would pay for it.

Apart from the fact that loss of profits was an incompetent measure of damages on the breach of contract alleged, the plaintiffs' expert presented a wholly illogical and unacceptable calculation of those allegedly lost profits. He derived a purported rate of return of 14.5% on plaintiffs' investment in the hypothetical new distributorship by comparing half of Capitol City's *pre-tax profits* with the proceeds they received for its sale. He then compared that 14.5% with the 8% return plaintiffs were realizing on

28. The "before and after" test permits a plaintiff, injured in his business by an antitrust violation, to estimate what profit he would have earned by evidence of the past profits and performance of that same business. See *Eastman Kodak* v *Southern Photo Materials Co.*, 273 U.S. 359 (1927). The "yardstick" test allows such a plaintiff to estimate the profits he would have earned but for the injury by reference to a closely comparable business not affected by the antitrust violation.

the low risk AAA bonds[29] in which they had invested their sale proceeds, concluding that in consequence of Seagram's alleged breach plaintiffs were losing profits of 6.5% of their sale proceeds, or $83,000 a year. This annual loss he multiplied by the assumed number of years plaintiffs would operate the new house from the date of alleged breach (September, 1971), and then, discounting for current value, he concluded that plaintiffs' loss of profits would exceed $850,000. (280a-294a)

On cross-examination, however, the expert admitted that after Capitol City or the hypothetical new house had paid income taxes on its pre-tax profits, the maximum dividends payable could not have exceeded a return of more than 6.9% against plaintiffs' proceeds from the sale of Capitol City--a return on investment of 1.1% less than they realized on low risk AAA bonds. (311a-313a) Consequently, correctly calculating the return on their investment in a hypothetical house modeled on Capitol City, plaintiffs incurred no loss of profits and fared better by their investing in AAA bonds. The lower court ignored this fatal defect in the loss of profits calculation.

The remaining elements of the damage claim were not treated in the District Court's opinion and are so patently without merit that they deserve little comment. One involved a claim for lost good will, which involved growth projections from Capitol City. This, again, was an impermissibly speculative calculation, because it was applied to an unknown and unidentified new business in a different geographic area (also unknown). In addition, the potential growth of good will, like potential profits, is not a proper element where the claim is not predicated upon injury to or destruction of a business.

Another element of alleged damage was a claim for additional capital gains taxes paid when Lee Industries, Inc. (the changed name of the Lees' corporation after their sale of the Capitol City business and name) was dissolved. The underlying, baseless assumption was that these taxes

29. As plaintiffs' expert testified: "They could have gotten more by taking greater risks." (288a)

could have been avoided if Seagram had provided plaintiffs with a new house before their tax deadline, so that liquidation would have been unnecessary. (302a-304a) However, Henry and Arthur Lee still owned 50 percent of Lee Industries, Inc., and Lester and Eric Lee could not have used it as a vehicle to go into business on their own without buying out the remaining shareholders. This would have subjected Henry and Arthur Lee to an additional tax liability of $70,000 in order to save the plaintiffs $55,000. (315a-317a) Lester Lee testified that no agreement had been reached with Henry and Arthur as to keeping Lee Industries in existence (211a), and plaintiffs' expert conceded that liquidation was a likely occurrence in any event. (326a)

The last damage element claimed (294a-297a), loss of salaries and fringe benefits by Lester and Eric Lee, is simply not a measure of damages in this case. Whatever Seagram's obligation might have been, there was no contract of employment involved. Moreover, the fact al assumptions necessary to the calculations are preposterous. They assume that Lester Lee will not be able to find anything but unremunerative temporary employment for ten years and that Eric Lee, who now owns his own business, will not pay himself a salary for a like period.

Plaintiffs have not been damaged because there was never an ascertainable and enforceable contractual obligation. If there had been only an obligation to notify plaintiffs of potentially available distributorships, then the proof of damages would not have been competent (nor would there have been evidence of a breach). In any circumstances, however, the District Court erroneously permitted the introduction of incompetent evidence of damage consisting solely of irrelevant and hypothetical projections which required the jury to engage in "rampant speculation" based upon ". . . an array of figures conveying the impression of exactness in an area where a jury's common sense is less available than usual to protect it." *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir. 1962); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 87 (9th Cir.

1969), *cert. denied,* 396 U.S. 1062 (1970). That conclusion is supported by the fact that the jury returned a verdict of $407,850, only a minor fraction of the calculations by plaintiffs' expert and an amount which cannot be reasonably related to any element of those calculations, thus demonstrating that they were confusing and incomprehensible to the jury, which merely picked a figure from thin air.

Conclusion

The judgment below should be reversed, and entry of a judgment for the defendant dismissing the complaint should be ordered.

Dated: New York, New York
September 16, 1976

Respectfully submitted,

White & Case
Attorneys for Defendant-Appellant,
Joseph E. Seagram & Sons, Inc.
14 Wall Street
New York, New York 10005
(212) 732-1040

Of Counsel:
Macdonald Flinn
E. Miles Prentice, III
Robert W. Mannix

Service of TWO copies of the
within Brief is hereby
admitted this 17th day of
Sept 1976
Signed Malcolm A. Hoffman
Attorney for Plaintiffs-Appellees

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(5477)